IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.12.2007

Coram:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeal No.259 of 2003

Tamilnadu Small Industries
Development Corporation Ltd.,
Paulwel's Road, Kathipara Junction,
Chennai 16, represented by its
Chairman & Managing Director Appellant

v.

1. Sathya Constructions,
Plot No.1230, 3rd Sector,
15th Street,
Anna Nagar Western Extension,
Chennai 50, rep. By its partner

2. T.Arulraj, Sole Arbitrator
H.M.C.A. Building,
223 NSC Bose Road,
Chennai. Respondents

Original Side Appeal filed under Order XXXVI Rule 1 of O.S. Rules read with clause 15 of the Letters Patent against the order of a learned single Judge dated 30.06.2003 made in O.P. No.710 of 2002.

For appellant : Mr.B.Shantha Kumar

For respondent 1: Mr.K.Kabir

JUDGMENT

K.RAVIRAJA PANDIAN, J.

The appellant - Tamilnadu Small Industries Development Corporation Ltd., in this appeal assails the order of the learned single Judge dated 30.06.2003 dismissing the O.P. No.710 of 2002 filed under section 34 of the Arbitration and Conciliation Act,

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1996 for setting aside the award of the arbitrator dated 24.05.2002.

2. The learned counsel for the appellant, questions the order of the learned single Judge on the ground that the learned single Judge has not considered the issue that there was no dispute at all. The basic principle that in order to be entitled to ask for arbitration, there must be not only entitlement of money, but also the difference and the dispute arising the between the parties exist. The appellant admitted that the final bill has not been settled in favour of the respondent. In such circumstances, the reference itself is bad in law. He further contended that the award of interest by the arbitrator, when there is a prohibitory clause in the agreement, cannot be legally sustained and the learned single Judge has totally lost sight of the prohibitory clause in the agreement. On these two grounds, the learned counsel sought to assail the order. He also referred to the provisions of section 28(3) and 31(7)(a) of the Act, 1996 and relied on a division bench judgment of this Court in the case of Sri Kamatchi Amman Constructions v. Divisional Railway Manager/Works, (2007) 5 MLJ 257.

3. On the other hand, the learned counsel appearing for the respondent argued for sustaining the order of the learned single Judge.

4. We heard the arguments of the learned counsel on either side and perused the materials available on record.

5. The material facts culminated in the filing of the above appeal are as follows :

The first respondent entered into contract for construction of 73 numbers of staff quarters at Thiru Vi.Ka. Industrial Estate at Guindy on 07.12.1995. On the same day the work order was issued. The period for completion of the contract was four months from the date of handing over of the site. There was delay in handing over of the site and the work was completed on 30.09.1996. The respondent filed the final bill for settlement. In spite of the passage of time, the bill was not settled. Hence, the respondent approached this Court to refer the matter for arbitration for resolving the dispute between the parties regarding settlement of bills under section 11 (6) of the Act. This Court, by order dated 26.02.1999 referred the matter to be resolved by an arbitrator.

6. Before the arbitrator, the respondent claimed a sum of Rs.36,62,838/- on various heads. The arbitrator by his award dated 24.05.2002 made an award in a sum of Rs.7,60,104/- and interest over it in a sum of Rs.4,10,456/- totalling a sum of Rs.11,70,560/- with further interest @ 18% per annum on Rs.7,60,104/- from 01.07.1999 till the date of realisation. The appellant, aggrieved by the award made by the arbitrator, filed

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O.P. No.710 of 2002 under section 34 of the Act to set aside the award. The learned single Judge, by the impugned order, dismissed the original petition on 30.06.2003. Hence, the present appeal.

7. The law in the arbitration proceedings has been now well settled that the award of the arbitrator is ordinarily final and conclusive as long as arbitrator has acted within his authority and according to the principles of fair play and the power of the Court to set aside the award is restricted to the instances set out in section 34 of the Act. As per section 28(3) of the Act, in all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the Trade applicable to the transaction. Where the fundamental terms of agreement of the parties are ignored by the arbitrator, the arbitrator is held to have exceeded his jurisdiction, even where the jurisdiction clause itself is widely worded. It is not open to the Court to re-assess the evidence to find if the Arbitral Tribunal has committed any error and re-assess the evidence as if it were a Court of appeal. Interest could be awarded only in the absence of any specific stipulation or prohibition in the contract and in the absence of an agreement by the parties to contract, Arbitral Tribunal may award interest and section 31(7)(a) underlines the discretion of the Arbitral Tribunal to award interest it deems reasonable. Awarding pendente lite interest is a matter within the discretion of the arbitrators.

8. In respect of the first point, we are afraid, we cannot countenance the same as we are of the view that the appellant did not make such a plea either before the arbitraor or before learned single Judge for the obvious reason that at the instance of the respondent this Court by its order dated 26.02.1999 referred the matter for arbitration. Hence, the first ground of attack deserves to be rejected and the same is rejected.

9. In respect of the second ground of granting interest, clause 64 of the agreement read as follows :

> "Payment will be made to the contractor under the certificates to be issued at reasonably frequent intervels by the Executive Engineer or the Sub Divisional Officer within 14 days of the date of each certificate and intermediate payment will be made by the Executive Engineer or the Sub-Divisional Officer of a sum equal to 95 per cent of the value of work as so certified and the balance of 5 per cent will be withheld and retained as security for the due fulfilment of the contract.
>
> Under the certificate to be issued by the Executive Engineer or Sub Divisional Officer on the completion of the entire works, the contractor will receive the final payment by virtue of the contract except security deposit and the withheld amount equal to 2.5 per cent of the

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total value of the work done provided is no recovery from or forfeiture by the contractor to be made under clause 37. The amount withheld from the final bill will be retained under 'Deposits' and paid to the contractor together with the security deposit after six months reckoned from the date of completion of work or as soon after the expiration of such period of six months as all defects shall have been made good according to the true intent and the meaning thereof whichever shall last happen. In the event the final bill remains unpaid even. (emphasis supplied)

.....

64.1A

Notwithstanding the above clause, the withheld amount of 2.5 per cent from the final bill in respect of contract for construction of original building will be retained by the Government for a total period of two years in lieu of six months period referred to in clause 64.1 (above) and will be released after the expiry to two years' period on execution of an indemnity bond by the contractor to the satisfaction of the Executive Engineer for a further period of three years to ensure structural stability of the building under clause 26.1.A. (emphasis supplied)

Clause 65 needs to be referred in this case which read as :

65.1 No omission by the Executive Engineer or the sub-divisional officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee found or payments in arrear, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him.

Thus, it could be seen that in respect of the earnest money deposit of Rs.79,066/- interest can be levied only after expiry of six months from the date of completion of work (clause 64). For the with-held amount as per the agreement in a sum of Rs.97,823/- interest can be levied only after two years reckoned from the date of completion of work (clause 64-1A). For the rest of the period, the above referred to clause cannot be put into service to contend otherwise.

10. The learned single Judge has referred to the judgment of APSRTC, rep. By its General Manager (Now redesignated as Managing Director) Mushirabad, Hyderabad v. P.Ramanareddi, 1989 (1) ALT 195 wherein an identical clause which read as ...

"69. Interest on money due to the contractor (a) No omission by the Executive Engineer or the sub-divisional officer to pay the amount due upon certificates shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee found or payments in arrear, nor upon any balance which may, on the final settlement of his accounts, be found to be due to him." --

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has been considered and held that the clause was intended to really prevent any claim for interest during the running period when final bill was not settled and also in respect of the Earnest Money Deposit or the sum equal to 2 ½ % of the total value of the work done till the expiry of the period of six months. This six months period was called the 'observation period', so that the department could see whether the work was done satisfactorily or not. The said clause could not be construed as a total prohibition, but it operates a limited period of six months from the date of the completion of the work.

11. Likewise, the Supreme Court in the case of State of Uttar Pradesh v. Harish Chandra and Co (1999) 1 SCC 63 has held that the claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, there was no prohibition which could be culled out against the respondent-contractor that he could not raise the claim for interet by way of damages before the arbitrator on the relevant items placed for adjudication. A comparable provision, which has been construed by a three Judge Bench judgment of the Supreme Court has also been referred to in that case to sustain the claim of interest. In that case, the Interest Act was also taken into consideration. So is the judgment of the Supreme Court in the case of ONGC v. Ms/ M.C. Clelland Engineers, S.A. (1999) 4 Supreme 235 wherein it was held that merely because award itself was on claim of interest for delayed payment, interest awarded on award amount till realisation could not be said to be unjustified.

12. In view of the law declared by the apex Court, we are of the view that the appellant has not made out any case for interference in awarding of interest except for the period as indicated in paragraph 9 above in respect of earnest money deposit and withheld amount. With this modification, the appeal is disposed of. No costs.

Sd/-
Asst. Registrar.

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